BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CELESTINO CARDENAS	)	
Claimant	)	
	)	
VS.	)	
	)	
KANCO HAY CO., LLC;	)	
TOTAL QUALITY LOGISTICS, LLC	)	
Respondents	)	Docket No. 1,060,737
	)	
AND	)	
	)	
CONTINENTAL NATIONAL INDEMNITY CO.;	)	
TRAVELERS	)	
Insurance Carriers	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the April 10, 2014, preliminary hearing Order entered by Administrative Law Judge (ALJ) Pamela J. Fuller. Roger A. Riedmiller of Wichita, Kansas, appeared for claimant. David A. Gellis of Kansas City, Missouri, appeared for respondent Kanco Hay Co., LLC, and its insurance carrier, Continental National Indemnity Co. (Kanco). William L. Townsley, III, of Wichita, Kansas, appeared for respondent Total Quality Logistics, LLC, and its insurance carrier, Travelers (TQL).

The ALJ found claimant is a self-employed, independent trucker who did not provide workers compensation insurance for himself; therefore, claimant's requests for benefits were denied.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the April 7, 2014, Preliminary Hearing and the exhibits; the transcript of the September 7, 2012, deposition of claimant and the exhibits; the transcript of the October 26, 2012, discovery deposition of Loren Tremain and the exhibits; the transcript of the October 26, 2012, discovery deposition of Larry Fallwell and the exhibits; the transcript of the January 28, 2014, deposition of claimant; and the transcript of the March 27, 2014,

evidentiary deposition of Marc Bostwick and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Claimant argues he established a statutory employer/employee relationship with Kanco, and therefore, the ALJ's Order should be reversed.

Kanco maintains claimant was a self-employed subcontractor. Moreover, Kanco contends claimant is not covered by the Kansas Workers Compensation Act, as he never made an election for workers compensation coverage.

TQL argues the ALJ's Order should be affirmed, as TQL was not claimant's employer, statutory or otherwise. Additionally, TQL maintains claimant was a self-employed independent contractor and not entitled to workers compensation benefits from either respondent.

The issue for the Board's review is: Is claimant a statutory employee of either respondent?

FINDINGS OF FACT

Claimant was the owner and sole employee of Cardenas Trucking.[1] In this position, claimant drove his personal semi-truck with flatbed trailer to various locations, acquired loads, and delivered the loads to customers. Claimant owned his own truck and financed the purchase in Dallas, Texas. Claimant made monthly payments for the purchase loan and insurance on his truck. Claimant was responsible for maintaining the vehicle. Claimant was paid by the job, the amount of which was based upon a variety of factors.

Claimant acquired the information for jobs from brokerage. Claimant could decide which job to accept and to which locations he would travel. In March 2012, claimant predominantly worked with broker Troy Deman from TOTC Logistics. TQL contacted Mr. Deman with a need for a driver for their client Kanco, and Mr. Deman then informed claimant of the request. Claimant testified he was not an employee of TQL and signed an agreement stating he was an independent contractor when he accepted the job.

Claimant's job, per TQL's instruction, was to acquire a load of alfalfa from Kanco. Claimant was to haul this load to Mississippi. Kanco employs its own drivers to deliver alfalfa, but Larry Fallwell, Kanco's co-owner, testified Kanco usually contracts outside drivers for long hauls. Kanco contracted with TQL to provide a driver. Mr. Fallwell testified

[1] The USDOT Company Snapshot indicates the legal name as Celestino Cardenas d/b/a Cardenas Trucking. (Claimant's Depo. [Sept. 7, 2012], Ex. 2.)

he did not specifically choose claimant as the driver but instead was informed by TQL a truck would arrive to haul the load. Mr. Fallwell had no discussions with claimant, and he did not tell claimant which route to take or how to complete the delivery. Mr. Fallwell explained claimant was not an employee of Kanco. Kanco's agreement was with TQL, not claimant. Claimant agreed with Mr. Fallwell, testifying he was not an employee of Kanco.

Mr. Fallwell testified, when making the agreement with TQL, he was of the understanding TQL provided workers compensation insurance for its drivers. Mr. Fallwell stated the agreement was every driver for TQL had cargo insurance, liability insurance, and workers compensation insurance. TQL also had its own workers compensation insurance, and Mr. Fallwell stated he was verbally assured by a TQL representative of the coverage. The Certificate of Liability Insurance,[2] provided to Kanco by TQL, indicates general, liability, and umbrella insurance coverage only.

Marc Bostwick, an operational sales manager for TQL, testified TQL provides workers compensation insurance for its employees only. Mr. Bostwick indicated claimant was not an employee of TQL. Instead, independent motor carriers such as claimant "are independent contractors and they acquire their own workers compensation based on the laws of the state that they reside in."[3] Mr. Bostwick disputed Mr. Fallwell's testimony, stating TQL did not agree their drivers would be covered by workers compensation insurance because TQL does not employ any drivers, nor does it own trucks. TQL is a non-asset-based freight broker in the business of reselling a service of arranging freight. TQL contracts with thousands of carriers in order to conduct its business.

On the afternoon of March 5, 2012, claimant arrived at Kanco to acquire a load of alfalfa. The buyer of the alfalfa, located in Mississippi, gave instructions the load was to be covered by a tarp. Claimant drove his truck onto a scale on Kanco's premises prior to receiving the load. Loren Tremain, a loader/operator for Kanco, testified he directed claimant to move and park the truck near a barn after weighing the empty truck. Mr. Tremain then proceeded to load claimant's truck with a half-load of alfalfa, the amount to be delivered to Mississippi. After the truck was loaded, it was weighed again on the scales before Mr. Tremain directed claimant to park elsewhere to tarp his load. Mr. Tremain suggested claimant borrow a ladder to climb atop the load. Mr. Tremain testified he did not see claimant again until after the accident.

At some point in the tarping process, claimant fell from the load to the ground. No one witnessed claimant's fall. Claimant testified he remembers nothing from the fall. Mr. Fallwell testified he viewed claimant tarping the load through a picture window:

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[2] See Fallwell Depo., Ex. 1 at 9.

[3] Bostwick Depo. at 15.

> . . . I walked over and looked out the big picture window and the scales. He was on top of his truck. It was absolutely a perfect, calm day. There wasn't a breath of – there wasn't any wind or anything.
>
> I looked at it and he had the front portion already all tarped down and was on the – on the truck. And then I went back in my office and then – I don't recall – someone hollered out.[4]

Mr. Fallwell's assistant called 911. Mr. Fallwell stated claimant was lying on his face on the ground complaining of back pain. Claimant indicated he could not feel his legs.

Emergency personnel arrived, and claimant was transported to Via Christi Hospital in Wichita, Kansas. Medical records indicate claimant was diagnosed with status post fall with positive loss of consciousness, right pneumothorax, right pulmonary contusion, right V through IX rib fractures, right T9 transverse process fracture, T10 burst fracture with a spinal cord contusion with notable cord edema, and T11 superior endplate compression and large lower anterior thoracic paravertebral hematoma.[5] A right chest tube was placed in claimant for the duration of his hospital stay, and a thoracic fusion was performed before his discharge to rehabilitation on March 28, 2012.

Claimant is paraplegic as a result of the fall. He returned to Nevada, his state of residence since 1991, and began physical therapy at Healthsouth. Claimant testified he remained at Healthsouth for approximately three months before transferring to another facility. Claimant now receives physical therapy at his home, and he continues to receive medical treatment for his condition. Claimant has not worked since the accident.

Claimant had the option under Kansas law to elect as a self-employed person to be covered by workers compensation. Claimant testified he did not complete any paperwork for the State of Kansas in this regard prior to the accident.

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501b(c) states in part: "The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2011 Supp. 44-508(h) defines burden of proof: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence

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[4] Fallwell Depo. at 14-15.

[5] See P.H. Trans., Cl. Ex. 1 at 1.

that such party's position on an issue is more probably true than not true on the basis of the whole record . . . ."[6]

It is often difficult to determine in a given claim whether a person is an employee or an independent contractor because there are, in many instances, elements pertaining to both relationships that may occur without being determinative of the actual relationship.[7]

There is no absolute rule for determining whether an individual is an independent contractor or an employee.[8] The relationship of the parties depends upon all the facts, and the label that they choose to employ is only one of those facts. The terminology used by the parties is not binding when determining whether an individual is an employee or an independent contractor.[9]

> The primary test used by the courts in determining whether the employer-employee relationship exists is whether the employer had the right of control and supervision over the work of the alleged employee, and the right to direct the manner in which the work is to be performed, as well as the result that is to be accomplished. It is not the actual interference or exercise of control by the employer, but the existence of the right or authority to interfere or control that renders one a servant, rather than an independent contractor.[10]

In addition to the right to control and the right to discharge the worker, other commonly recognized tests of the independent contractor relationship are:

(1) The existence of a contract to perform a piece of work at a fixed price.

(2) The independent nature of the worker's business or distinct calling.

(3) The employment of assistants and the right to supervise their activities.

(4) The worker's obligation to furnish tools, supplies and materials.

(5) The worker's right to control the progress of the work.

(6) The length of time the employee is employed.

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[6] See *Box v. Cessna Aircraft Company*, 236 Kan. 237, 689 P.2d 871 (1984).

[7] See *Jones v. City of Dodge City*, 194 Kan. 777, 402 P.2d 108 (1965).

[8] See *Wallis v. Sec'y of Kansas Dep't of Human Res.*, 236 Kan. 97, 103, 689 P.2d 787, 792 (1984).

[9] See *Knoble v. National Carriers, Inc.*, 212 Kan. 331, 510 P.2d 1274 (1973).

[10] *Wallis, supra,* at 102-03; citing *Jones v. City of Dodge City*, 194 Kan. 777, 402 P.2d 108 (1965).

(7) Whether the worker is paid by time or by job.

(8) Whether the work is part of the regular business of the employer.[11]

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[12] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[13]

ANALYSIS

Although not defined in the Act, our courts have consistently defined an independent contractor as one who, in exercising an independent employment, contracts to do certain work according to his or her own methods, without being subject to the control of the party he or she contracts with, except as to the results or product of his or her own work.[14] Our Supreme Court has held that the principal test is the "right of control" test.[15]

The Kansas Supreme court in *Wallis v. Sec'y of Kansas Dep't of Human Res.*,[16] citing *McCarty v. Great Bend Board of Education*,[17] wrote:

> [A]n independent contractor is one who, in the exercise of an independent employment, contracts to do a piece of work according to his own methods and who is subject to his employer's control only as to the end product or final result of his work. On the other hand, an employer's right to direct and control the method and manner of doing the work is the most significant aspect of the employer-employee relationship, although it is not the only factor entitled to consideration. An

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[11] *See McCubbin v. Walker*, 256 Kan. 276, 886 P.2d 790 (1994). (The list was expanded to 20 in *Hill v. Kansas Dep't of Labor, Div. of Workers Comp.*, 42 Kan. App. 2d 215, 222-23, 210 P.3d 647 [2009] *aff'd in part, rev'd in part*, 292 Kan. 17, 248 P.3d 1287 [2011].)

[12] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[13] K.S.A. 2013 Supp. 44-555c(j).

[14] *Olds-Carter v. Lakeshore Farms, Inc.*, 45 Kan. App. 2d 390, 401, 250 P.3d 825 (2011), citing *Falls v. Scott*, 249 Kan. 54, 64, 815 P.2d 1104 (1991); *Krug v. Sutton*, 189 Kan. 96, 98, 366 P.2d 798 (1961).

[15] *Danes v. St. David's Episcopal Church*, 242 Kan. 822, 831-32, 752 P.2d 653 (1988).

[16] *Wallis, supra,* at 103.

[17] *McCarty v. Great Bend Board of Education*, 195 Kan. 310, 403 P.2d 956 (1965).

> employer's right to discharge the workman, payment by the hour rather than by the job, and the furnishing of equipment by the employer are also indicia of a master-servant relation.

In *Falls v. Scott*,[18] our Supreme Court wrote:

> [The test is] whether the employer has the right of control and supervision over the work of the alleged employee, and the right to direct the manner in which the work is to be performed, as well as the result which is to be accomplished. It is not the actual interference or exercise of the control by the employer, but the existence of the right or authority to interfere or control, which renders one a servant rather than an independent contractor. [Citations omitted.]

Claimant owned and operated his own trucking company. Claimant financed the purchase of his own truck. Claimant paid his own insurance on the vehicle. Claimant was responsible for maintaining his vehicle. He contracted with different brokers who simply told him where to pick up and deliver loads. This job was no different than any other hauling assignment accepted by claimant.

Claimant was asked questions by his attorney about the loader telling claimant where to park and that the load had to be tarped. Claimant was also asked if Kanco provided the ladder to access the load for the purpose of covering the load. Claimant knew the load had to be covered when he received the assignment for the job. Parking in the correct location and allowing claimant to use a ladder are not expressions of control by Kanco.

There is no evidence Kanco maintained any right to control or discharge claimant. The undersigned Board Member adopts and incorporates the findings of fact and conclusions of law contained in the ALJ's order of April 10, 2014.

CONCLUSION

Claimant was, at the time of the injury, an independent contractor not covered by the Kansas Workers Compensation Act.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Pamela J. Fuller dated April 10, 2014, is affirmed.

IT IS SO ORDERED.

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[18] *Falls v. Scott*, 249 Kan. 54, 64, 815 P.2d 1104 (1991).

Dated this _____ day of June 2014.

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HONORABLE SETH G. VALERIUS
BOARD MEMBER

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Pamela J. Fuller, Administrative Law Judge